November 23, 2017

**VIA ELECTRONIC FILING**

Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

**Re: Notice of Ex Parte Communication**
**Notice of Proposed Rulemaking — Restoring Internet Freedom, WC Docket No. 17-108.**

Dear Ms. Dortch,

On Monday, November 20, 2017, TechFreedom staff (Graham Owens, Legal Fellow, and I) met separately with Nathan Leamer and Nick Degani from Chairman Ajit Pai's office; Commissioner Brendan Carr and his chief of staff, Jamie Susskind; Claude Aiken from Commissioner Mignon Clyburn's office; and Travis Litman from Commissioner Jessica Rosenworcel's office. In each meeting, we discussed the current Open Internet proceeding as well as the ongoing litigation challenging the FCC's 2015 Open Internet Order, in which our organization has filed a petition for *certiorari* with the Supreme Court.[1] As these two matters are inextricably linked, we specifically discussed two legal issues that have gone almost unmentioned — but which speak directly to whether the FCC may properly claim authority to impose common carriage regulation on the Internet. Additionally, we also discussed the FCC's preemption powers and to what extent the Commission plans on exercising this power in the coming Order.

First, does classifying broadband as a telecommunications service under Title II constitute a "major question" requiring express congressional authorization? If regulation of the Internet — the central, transformative force in America today, and the object of $1.6 trillion in private

[1] Petition for Writ of Certiorari, *TechFreedom, et al. v. F.C.C.*, No. 17-503 (U.S. Oct. 3, 2017), http://docs.techfreedom.org/TF-OIO-Cert-Petition.pdf.

capital investment since 1996 (by far the largest source of capex in the U.S. economy) — is *not* a question of "vast 'economic and political significance,'" *what is*?[2]

Second, what does Section 230(c) of the Communications Decency Act (CDA) mean for the Commission's ability to enforce the current no-blocking rule, and for the broader question of how Congress intended the agency to apply the Telecommunications Act of 1996 (of which the CDA was a part)? Specifically, Section 230(c)(2)(A) immunizes "interactive computer service" providers — a term that includes a "service or system that provides access to the Internet"[3] — for "any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable."[4] This immunity would limit the ability of the FCC, or any other government or private plaintiff, to prevent broadband providers from blocking content — a problem only Congress can solve. More importantly, given that Congress conferred such immunity upon Internet access providers for the exercise of their editorial discretion, it cannot be assumed that Congress intended, per *Chevron*, to have left to the discretion of the agency the question of whether broadband providers should be deprived entirely of the editorial discretion by classifying them as common carriers.

We presented two written materials which address these two issues in greater detail:

- **Appendix A**: An Op-Ed published by Morning Consult entitled "Net Neutrality: Two Sleeper Legal Issues May Force Congress to Act."
- **Appendix B**: A memorandum summarizing pending litigation before the Supreme Court for organizations potentially interested in filing amicus briefs in the case.

In TechFreedom's initial Comments in this proceeding, we detailed, among other things, why the regulation of the Internet constitutes a major question and how Congress never expressly authorized the Commission to undertake rulemaking to resolve such a major question.[5] Indeed, our comments reiterated that, for all its confusion, its myopic fumbling at technocratic planning for a future it could not foresee, Congress was unmistakably clear on one crucial, overarching point: "the policy of the United States" would be "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer

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[2] *Util. Air Regulatory Grp. v. E.P.A.*, 134 S. Ct. 2427, 2443–44 (2014) (quoting *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000)).

[3] 47 U.S.C. § 230(f)(2).

[4] 47 U.S.C. § 230(c)(2)(A).

[5] *See* Comments of TechFreedom, WC Docket No. 17-108 (filed Aug. 30, 2017), http://docs.techfreedom.org/TechFreedom_Reply_Comments_on_Open_Internet_Order.pdf.

services, unfettered by Federal or State regulation[.]"[6] Thus, no matter how wisely crafted or necessary the FCC's 2015 Order may have been, to change Congress' light-touch policy simply to suit its own assessment runs contrary to the Constitution's separation of powers.

This is particularly true given the 2015 Order's regulation of the entire Internet, which courts have said is "arguably the most important innovation in communications in a generation."[7] As Judge O'Malley of the Federal Circuit noted, "[if] Congress intended for the Commission to regulate one of the most important aspects of modern-day life, Congress surely would have said so expressly."[8] While Judge O'Malley was referring to claims made by the International Trade Commission that its authority to regulate the importation of specific "articles" under a 1930 statute included "electronic transmission of digital data," the underlying point remains the same for the FCC: if Congress intended for the FCC to regulate the entire Internet it surely would have done so expressly.

As both Appendices explain, this is precisely what two D.C. Circuit judges said in their respective dissents: deferring to the FCC's 2015 claims violates the Constitution's separation of powers because it would allow the FCC to decide major questions that Congress could not have intended to leave to the agency implicitly. In coming to this conclusion, both judges echoed Judge O'Malley's recognition that the Internet is "one of the most important aspects of modern-day life," and any regulation affecting the Internet will inevitably affect almost every American citizen in some form. For this reason, it become clear that, if regulating the Internet isn't a "major question," it's hard to see what could be. This is precisely what Judge Kavanaugh, one of the dissenting D.C. Circuit judges, aptly noted: the 2015 Order "will affect every Internet service provider, every Internet content provider, and every Internet consumer," and, as such, "[t]he economic and political significance of the rule is vast."[9] Thus, it becomes quite clear — and the FCC should ensure to make equally clear in its new Order — that classifying broadband as a common carrier subject to Title II constitutes a major question of "vast economic and political significance," which Congress never authorized.

As to the lack of congressional authorization, the second legal issue — Section 230 — is particularly illustrative. Over the past 25 years, the Supreme Court has required *clear* congressional authorization for major agency rules such as the 2015 Order. Recently, the Supreme

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[6] 47 U.S.C. § 230(b)(2).

[7] *Clearcorrect Operating, LLC v. Int'l Trade Comm'n*, 810 F.3d 1283, 1301 (Fed. Cir. 2015) (O'Malley, J. concurring) (quoting *Comcast Corp. v. FCC*, 600 F.3d 642, 661(D.C.Cir. 2010)).

[8] *Id*.

[9] *United States Telecom Ass'n v. Fed. Commc'ns Comm'n*, 855 F.3d 381, 417 (D.C. Cir. 2017) (Kavanaugh, J., dissenting).

Court summarized this case law: "[w]e expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'"[10] To this end, a few canons of statutory interpretation read with Section 230 illustrate that Congress never clearly authorized the Commission to regulate broadband as a common carrier and, in fact, intended for the opposite to be true.

The Rule to Avoid Surplusage holds that that each word or phrase in a statute is meaningful and useful, and thus, an interpretation that would render a word or phrase redundant or meaningless should be rejected.[11] Similarly, the Rule of Continuity assumes that Congress does not create discontinuities in legal rights and obligations without some clear statement.[12] Thus, as Appendix A illustrates, since Section 230 clearly allows broadband providers to block at least *some* third party content on their sites, at least when done in "good faith," to read another section of the same Act as saying the FCC can prevent the same broadband providers from blocking third parties, would render Section 230 meaningless and create discontinuities in broadband providers' legal rights. Again, it is simply not possible that Congress could simultaneously have encouraged Internet service providers to exercise editorial discretion while also allowing the FCC take away their discretion by making them common carriers.

Ultimately, the FCC's new Open Internet Order should make clear that classifying broadband as a common carrier subject to Title II is a major question of "vast economic and political significance," and that Congress has yet to assign to the FCC the authority to address so "major" a question. The more clearly the FCC declares this issue to be — as a matter of the Constitution's separation of powers — beyond the discretion of the agency to resolve, the sooner Congress will finally decide how to legislate in this area.

Beyond these two issues, we also discussed the FCC's preemption powers — both generally under the commerce and supremacy clauses of the Constitution and those specifically granted to the Commission by Congress — and to what extent the Commission plans to exercise these powers in the forthcoming Open Internet Order. We noted in our discussions, as the Supreme Court has made clear, that the FCC can and should preempt state laws "where

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[10] *U.A.R.G.*, 134 S.Ct. at 2444 (quoting *Brown & Williamson*, 529 U.S. at 160 (2000)).

[11] *See* William N. Eskridge, Jr., Philip P. Frickey, & Elizabeth Garrett, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 833 (3d. ed. 2001).

[12] See Ernest A. Young, *The Continuity of Statutory and Constitutional Interpretation: An Essay for Phil Frickey*, 98 Cal. L. Rev. 1371, 1373 (2010) ("Because important structural statutes … perform significant constitutive functions, it makes sense that they should be interpreted in light of constitutional purposes, including federalism and other structural values.").

compliance with both federal and state law is in effect physically impossible" or where "Congress, in enacting federal statute, expresses clear intent to preempt state law."[13] Specifically, in the forthcoming coming Order, the FCC should first make clear the extent to which it plans on exercising such power to provide states fair notice, and use its preemption power to ensure that states do not enact regulations which conflict with the FCC's likely decision to return to the light-touch regulatory regime which Congress expressly intended it to take.[14]

This is particularly critical for two reasons. First, doing so would afford businesses the regulatory certainty necessary to accomplish the Commission's longstanding mission of ensuring "that an orderly framework exists within which communications products and services can be quickly and reasonably provided to consumers and businesses."[15] Second, doing so would ensure the FCC's regulatory approach is consistent with courts' interpretation of the Communications Act as a comprehensive national framework. As the D.C. Circuit recognized half a century ago, the Communications Act "must be construed in light of the needs for *comprehensive* regulation and the practical difficulties inhering in state by state regulation of parts of an organic whole. … [F]ifty states and myriad local authorities cannot effectively deal with bits and pieces of what is really a unified system of communication."[16]

Finally, the FCC should clearly delineate what constitutes interstate services — thus preempted — and what constitutes purely interstate services, and make clear that those services which cannot be easily separated will be considered interstate for purposes of preemption. This is not only good policy, but in line with the Supreme Court's interpretation, which states that "FCC preemption of state regulation [should be] upheld where it [is] not possible to separate the interstate and the intrastate components of the asserted FCC regulation."[17]

Pursuant to the Commission's rules, please include this written *ex parte* and the attached documents in the docket for the above-referenced proceedings.

Sincerely,

Berin Szoka
President

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[13] *Louisiana Pub. Serv. Comm'n v. F.C.C.*, 476 U.S. 355, 368 (1986).

[14] 47 U.S.C. § 230(b)(2) (stating that "the policy of the United States" would be "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation[.]").

[15] Fed. Commns Comm'n, *Strategic Plan of the FCC* (last visited Nov. 23, 2017), https://www.fcc.gov/general/strategic-plan-fcc.

[16] *Gen. Tel. of Cal. v. FCC*, 413 F.2d 390, 398-401 (D.C. Cir. 1969) (emphasis added).

[17] *Louisiana Pub. Serv. Comm'n*, 476 U.S. at 375, n.4.

# APPENDIX A

**Net Neutrality: Two Sleeper Legal Issues May Force Congress to Act**

The net neutrality fight is about to blow up again. The FCC is expected to release a draft of the third Open Internet Order on November 22 — exactly three weeks before the December 14 meeting. In April, Chairman Pai proposed undoing the broad claims of authority made by President Obama's two chairmen. That will hand responsibility for policing broadband back to the Federal Trade Commission, the Department of Justice, state attorneys general, and private plaintiffs.

Groups that support the current rules will sue, of course, and the issue will go up to the D.C. Circuit for the fourth time sometime early next year. Meanwhile, briefs are being filed with the Supreme Court, asking them to hear appeals filed in the third round of litigation, including by our organization, TechFreedom.

Will this fight ever end? Or are we doomed to play ping pong forever on the question of the FCC's authority over the Internet? Whether the Supreme Court or Congress finally resolves this question turns on two arcane but vital legal issues that have gone almost unmentioned — in news coverage as well as Congressional hearings.

The first question is how much deference, *if any*, the courts owe the FCC. The FCC won the last two rounds of litigation not because the D.C. Circuit agreed with the FCC's reading of what Congress intended in passing the 1996 Telecom Act, but because the court applied *Chevron* deference, whereby agencies get broad latitude to interpret ambiguous statutes. Throughout the current round of litigation, we've argued that *Chevron* simply doesn't apply, because the FCC's authority over the Internet is a "major question" — one that, as the Supreme Court has said in several key cases, of such vast "economic and political significance," and so vastly expands the agency's regulatory authority, that a clear statement from Congress is required.

Two D.C. Circuit judges wrote lengthy, blistering dissents that turned on our argument: deferring to the FCC's claims violates the Constitution's separation of powers because it would allow the FCC decide questions Congress could not have intended to leave to the agency implicitly. *Chevron* was never intended to allow agencies to effectively rewriting their statute.

One of those judges, Brett Kavanaugh, is widely considered the best barometer of where the Supreme Court is heading on such questions. Indeed, it was his separation-of-powers argument that gave the Supreme Court a roadmap for its 2014 decision in *Utility Air Regulatory Group v EPA*. There, the Court blocked the EPA's Clean Power Plant rule, saying Congress needed to resolve this major question.

The Major Questions doctrine doesn't always mean the government loses. In fact, in *King v. Burwell*, Chief Justice Roberts invoked the doctrine, reviewed the statute *de novo* (instead of deferring under *Chevron*), and yet upheld it anyway. The doctrine isn't some right-wing trick for crippling the regulatory state; it actually originated with then-professor Breyer, before President Clinton appointed him to the Court.

But if regulating the Internet *isn't* a "major question," it's hard to see what could be. Indeed, Federal Circuit Judge O'Malley, another Clinton appointee, recently called regulation of the Internet a major question. Her dissent objected to the International Trade Commission's attempts to regulate downloads as "articles" under its 1930s statute. "[T]he responsibility," she concluded, "lies with Congress to decide how best to address these new developments in technology."

The second, related legal issue no one's talking about (at least in this context) is Section 230 — the broad immunity for online services that's gotten so much attention this summer because legislation is gathering steam to amend that immunity to go after sex traffickers. There's no question that the law protects broadband companies just as much as it protects websites like Google and Facebook. That means, at a minimum, broadband providers can't be sued for blocking third party content on their sites, so long as they do so in "good faith."

That caveat is important: if Hillary Clinton had won the election, Section 230 probably wouldn't have stopped her FCC from enforcing the net neutrality rules against anti-competitive conduct, but it's hard to see how the FCC — or, for that matter, the FTC or anyone else — could police the conduct net neutrality advocates say they're most worried about: outright (private) "censorship" of speech.

Understanding Section 230's application to broadband also makes clear why *Chevron* deference is inappropriate for the FCC's "reclassification" of broadband providers as Title II common carriers: There's just no way Congress could simultaneously have encouraged Internet service providers to exercise editorial discretion while also allowing the FCC take away their discretion by making them common carriers.

You might wonder why this hasn't come up before. Why are we — not broadband companies — the ones raising this issue now? It's simple: broadband providers are tired of being accused of wanting to censor the Internet. Title II proponents have said Verizon admitted in 2012 that it'd be "exploring those commercial arrangements" without net neutrality rules — as proof that Verizon and every other ISP was just waiting to start charging for "fast lanes." Verizon's lawyer was actually talking about paying content providers like ESPN — the *opposite* of the concern everyone has. Given the hysteria, imagine the reaction if an ISP mentioned Section 230 immunity.

So what will happen next? The Supreme Court might decline to hear our case. The FCC will probably invoke the major questions doctrine in its forthcoming order. But when that's challenged in court, the case will probably be resolved on *Chevron* grounds — leaving the FTC as the chief cop on the net neutrality beat until the next Democratic FCC Chairman. If we're right, that broadband providers aren't going to block speech anyway, so the FTC won't run into the Section 230 immunity.

Bottom line: both the major questions doctrine and Section 230 issues *could* lay dormant for years, undermining the certainty "edge" companies say they need. But they *shouldn't*. Everyone — including broadband providers — agrees on the basics. Legislation would resolve both of the issues detailed here, and remains the only way to settle the net neutrality issue once and for all.

*Berin Szóka is President of TechFreedom, a non-profit technology policy think tank. Graham Owens is a TechFreedom Legal Fellow.*

# APPENDIX B

## MEMORANDUM

**To:** Potential Amici
**From:** Berin Szóka, President, TechFreedom
Graham Owens, Legal Fellow, TechFreedom
**Date:** October 20, 2017
**Re:** *Amici* Briefs FCC Open Internet Order Supreme Court Case

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May the FCC claim authority to regulate the Internet despite a clear declaration from Congress in 1996 that "the Internet and other interactive computer services [remain] unfettered by Federal or State regulation?" 47 U.S.C. § 230(b)(2). Will courts simply defer to the FCC's claims about what Congress intended — or require Congress to make its intent clear?

These questions are now before the Supreme Court. At stake isn't "just" the future of the Internet; it's what role the courts will play in protecting the Constitution's separation of powers.[18] If the Court declines to take this case, there's no telling when the next such case might arise — or what the Court will look like then. Lawmakers have an opportunity to weigh in on this case by filing an amicus brief (due November 2). Doing so will help ensure that "congressional inaction [on "net neutrality" and clarifying the FCC's authority] does not license the Executive Branch to take matters into its own hands."[19]

Since the Supreme Court's 1984 *Chevron* decision, the courts have deferred to agency interpretations of ambiguous statutes. Justice Scalia championed *Chevron* as a bulwark against judicial activism — but even he came to believe that, in certain cases, granting *Chevron* deference "would deal a severe blow to the Constitution's separation of powers."[20] Scalia's 6-3 decision in *UARG* — transcending normal party lines — came out in the middle of the FCC's 2014 Open Internet Docket. The FCC, like the EPA, was attempting to significantly "tailor" its

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[18] While TechFreedom focused the separation of powers (the focus of this Memorandum), other Petitioners raised additional issues, including First Amendment concerns, that the FCC unreasonably concluded that the Internet and the telephone system are a single network, and statutory interpretation concerns.

[19] *United States Telecom Ass'n v. Fed. Commc'ns Comm'n*, 855 F.3d 381, 426 (Kavanaugh, J. dissenting) (citing *Hamden v. Rumsfeld*, 548 U.S. 557, 636 (2006) (Breyer, J., concurring) (gravely serious policy problem is nonetheless not a "blank check" for the Executive Branch to address the problem)).

[20] *Utility Air Regulatory Group (UARG) v. EPA*, 134 S. Ct. 2427, 2446 (2014) (barring the EPA from rewriting the Clean Air Act to regulate carbon emissions).

statute to do things Congress never intended ("net neutrality" regulation). TechFreedom intervened to support legal challenges to the FCC's 2015 Open Internet Order, on behalf of a small group of tech entrepreneurs. We were the *only* party to insist that *Chevron* simply ought not apply to a "major question" of such vast "economic and political significance"[21] or where the interpretation in question would effectuate an enormous and transformative expansion of the agency's regulatory authority. A D.C. Circuit panel upheld the rule in 2016,[22] and earlier this year, the D.C. Circuit denied rehearing.[23] But each time, dissenting judges agreed with us. Judges Kavanaugh and Brown both invoked the "major questions" doctrine.[24]

Crucially, it was Judge Kavanaugh whose dissent formed the basis for the Court's decision in *UARG*. Kavanaugh is widely considered to be the best barometer of where the Court is heading on constitutional and administrative law. In 2015, when the Court upheld Obamacare's subsidies, Chief Justice Roberts made clear that the court was *not* deferring to the IRS's interpretation under *Chevron*, but rather reviewing the statute *de novo* because the case involved "a question of deep 'economic and political significance' that is central to this statutory scheme."[25] Just as Justice Marshall established the principle of judicial review while finding *for* the government (in *Marbury v. Madison*), Chief Justice Roberts used *King v. Burwell* to re-affirm the major questions doctrine more clearly than ever before.

Just this week, the Court denied cert in a complicated case involving *Chevron*'s application to common law contract issues, but a highly unusual opinion by Justices Gorsuch, Roberts and Alito declared that "the issues lying at its core are surely worthy of consideration in a case burdened with fewer antecedent and factbound questions."[26] That's as close as the Court ever comes to begging for test cases. It will take just one more Justice for the Court to grant *cert* (review) in this case. That might come from Justice Breyer, who first articulated the Major Questions Doctrine, or Justices Kennedy or Thomas, who signed onto the key part of *UARG*.

The Court grants cert in fewer than 1% of the cases brought to it. The fact that the FCC is expected to issue a third Open Internet Order in December rolling back both major claims

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[21] *Id*. at 2444 (citing *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000)).

[22] *United States Telecom Ass'n v. Fed. Commc'ns Comm'n,* 825 F.3d 674 (D.C. Cir. 2016).

[23] *United States Telecom Ass'n v. Fed. Commc'ns Comm'n*, 855 F.3d 381 (D.C. Cir. 2017).

[24] *See id*. at 417 (Kavanaugh, J. dissenting) ("In a series of cases over the last 25 years, the Supreme Court has required clear congressional authorization for major rules of this kind.").

[25] *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) ("Whether those credits are available on Federal Exchanges is thus a question of deep 'economic and political significance' that is central to this statutory scheme; had Congress wished to assign that question to an agency, it surely would have done so expressly." (quoting *U.A.R.G.*, 134 S. Ct. at 2444)).

[26] *Scenic America, Inc. v. Dep't of Transportation*, 583 U.S. ___ (2017) (Gorsuch, J. concurring).

made by Democratic-led FCC certainly won't make a grant of *cert* more likely — but it also won't necessarily stop four Justices from voting to take this case. Critically, any FCC order won't actually resolve these issues, because:

- It's not certain the FCC will prevail in reversing these legal claims;
- Even if this FCC wins, the next Democratic FCC will reinstate the Obama FCC's legal claims, so the new order would provide only a short-term reprieve;
- A future Democratic FCC could use the common carriage powers claimed under Title II and the broader, murkier powers claimed under Section 706 for far more than net neutrality, including rate regulation, and apply them beyond broadband services; and
- The new order may not stop state PUCs from regulating the Internet.[27]

Only legislation or a Court decision can resolve these questions. Absent either, the regulatory uncertainty looming over the Internet will continue to discourage long-term investment:

- As FCC Chairman Ajit Pai has noted, the "possibility of broadband rate regulation looming on the horizon" forced companies to modify or cancel plans to "build or expand networks, unsure of whether the government would let them compete in the free market."
- Former Rep. Rick Boucher (D-VA), who cofounded the Congressional Internet Caucus and chaired the House Subcommittee on Communications and the Internet, has said: "One simply cannot expect carriers to invest tens of billions of dollars in broadband deployments when they don't know which regulatory aspects of Title II are going to be implemented by the FCC from time to time. Will the FCC control terms and conditions of service? Will it set rates? Will it require unbundling of networks or network elements? The prudent carrier simply steps back in such a situation and forestalls investment until longer-term clarity can be achieved."

If regulation of the Internet — the central, transformative force in America today, and the object of $1.6 trillion in private capital investment since 1996 (by far the largest source of capex in the U.S. economy) — is not a "major question," *what ever could be?* We expect the FCC's forthcoming order to invoke the major questions doctrine — just as the EPA's draft Clean Power Plan has invokes the major questions doctrine in explaining why the Obama-era claims of power (the ones at issue in *UARG*) were overly broad — and we expect other agencies to do the same, including the FCC in this proceeding.

[27] Section 706(a) applies equally to state PUCs and the FCC. State PUCs will likely invoke the *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014) (reading Section 706 as a grant of authority) even if the FCC reverses itself.